STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MCLEAN, Plaintiff-Appellee,	FOR PUBLICATION August 1, 2013
v	No. 309563 Wayne Circuit Court
CITY OF DEARBORN, Defendant-Appellant.	LC No. 10-007800-NO Advance Sheets Version

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

M. J. KELLY, P.J. (*dissenting*).

This appeal turns on whether defendant, city of Dearborn, established that it was entitled to summary disposition on the ground that plaintiff, Patricia McLean, failed to give proper notice of her claim as required by MCL 691.1404. On this limited record, I conclude that McLean—at the very least—established a question of fact as to whether she complied with the notice requirement by providing a supplemental notice to the city's third-party claims administrator, Broadspire. Accordingly, I must respectfully dissent from the majority's decision to reverse the trial court's denial of the city's motion for summary disposition.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation and application of both statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

The city moved for summary disposition on the ground that it was immune from suit under the undisputed facts. See MCR 2.116(C)(7). In reviewing a motion under MCR 2.116(C)(7), courts must accept the allegations stated in the plaintiff's complaint as true unless contradicted by documentary evidence submitted by the movant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The moving party may support its motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. *Id.*, citing MCR 2.116(G)(5). However, if it is not apparent on the face of the pleadings that the moving party is entitled to immunity as a matter of law, the moving party *must* support its motion with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3). In determining whether to dismiss a claim under MCR 2.116(C)(7), the reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that

the moving party has immunity. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996).

Although governmental entities are generally immune from tort liability when "engaged in the exercise or discharge of a governmental function," MCL 691.1407, they remain liable for "bodily injury or damage" caused by their failure to keep highways under their jurisdiction in "reasonable repair," MCL 691.1402(1). However, the Legislature provided that, as a condition of recovery, a person injured by a governmental agency's failure to properly maintain a highway under its jurisdiction must serve the governmental agency with notice of the occurrence and the defect within 120 days of the injury occurring. MCL 691.1404(1). In the notice, the injured party must "specify the exact location and nature of the defect," must describe "the injury sustained," and must give the "names of the witnesses" about which the injured person knows at the time of the notice. *Id*.

The city moved for summary disposition on the grounds that McLean's notice was deficient. Specifically, the city argued that McLean's notice, which was dated July 16, 2008, did not include the exact nature of the defect and did not include a description of the injury that she sustained. The city attached a copy of the July 16, 2008 letter to its motion for summary disposition. On its face, that letter did not provide the city with an adequate description of McLean's injuries.

McLean argued in response to the city's motion that she had submitted two separate letters to the city, which together satisfied the notice requirements within the 120 period. *Burise v City of Pontiac*, 282 Mich App 646, 654-655; 766 NW2d 311 (2009). McLean attached the second letter to her brief; the second later was dated September 16, 2008, and addressed to Broadspire.

When McLean's September 16, 2008, letter is examined together with her letter from July 16, 2008, McLean plainly provided the city with the minimum notice required under MCL 691.1404. And the majority here seems to concede that the letters would, if read together, comply with the notice requirements. Nevertheless, the majority concludes that it cannot consider the second letter because McLean submitted the letter to Broadspire and—in its view—Broadspire could not accept the notice on the city's behalf.

The Legislature provided that the required notice "may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency . . . ." MCL 691.1404(2). In the case of a city, process must generally be served on the "mayor, city clerk, or city attorney." MCL 600.1925(2). But it can also be accomplished by sending it to the "person in charge of the office of any of the above-described officers," MCL 600.1925, or to an "agent authorized by written appointment," MCL 600.1930.[1]

[1] These statutory provisions have been incorporated into our court rules at MCR 2.105(G) and MCR 2.105(H).

As can be seen from a cursory reading of these statutory provisions, McLean could properly serve her notice on persons other than the mayor, city clerk, or city attorney. Thus, the mere fact that she served her notice on someone other than the mayor, city clerk, or city attorney did not—standing alone—establish that her second notice was improperly served. Accordingly, the trial court correctly rejected the city's claim that it could not consider this letter because it was not addressed to the identified city officials.

Despite this, the majority rejects McLean's second letter because there "is simply no record evidence that Broadspire was authorized by *written appointment* or *law* to accept service" on the city's behalf. That is, the majority rejects the second letter because, in its view, McLean had the burden to present evidence that established that the city had authorized Broadspire to accept notice—and that it did so through a written instrument—before any notice sent to Broadspire could be considered. The problem with this contention is that the city never made that argument. The city never challenged Broadspire's authority to receive process; it merely argued that the notice had to be sent to its mayor, city clerk, or city attorney. And that argument was plainly incorrect. In engaging in the analysis that it does, the majority essentially faults McLean for failing to properly respond to a motion that the city never made—that is, the majority seems to anticipate the defect in the city's actual motion and solves that problem by making the argument that the city could have made had it thought to do so. But it is not this Court's obligation or place to remedy the deficiencies in a party's position on a motion for summary disposition; rather, to ensure fundamental fairness in the litigation process, this Court will typically only consider the arguments actually made and the evidence actually presented in considering the propriety of a trial court's decision on a motion for summary disposition. See *Barnard Mfg*, 285 Mich App at 380-383 (stating that this Court will not consider evidence that was not actually identified by the parties and that it is not the courts' responsibility to advocate on a party's behalf); *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (noting that the parties must raise an issue before the trial court or waive appellate review).

Because the argument that the city actually made before the trial court was insufficient to warrant disregarding the letter to Broadspire, the trial court was not precluded from considering it. This is not to say that the city might not be able to establish that the second notice was invalid; it may be able to do just that in a properly supported motion for summary disposition, but the motion at issue here was not such a motion.

Even setting aside the fact that the city never made the argument on which the majority now relies to reverse the trial court's decision, I cannot agree with the majority's premise that McLean failed to minimally support her position with evidence that the city authorized Broadspire to receive process.

In response to the city's motion for summary disposition, McLean argued that she properly submitted a second notice to the city. In support of her contention, she attached her letter dated September 16, 2008, to her brief. She also provided evidence that the city's claims adjuster solicited this second letter in a letter dated August 7, 2008. When this letter is read in the light most favorable to McLean, which we must do, see *Tryc*, 451 Mich at 134, a reasonable fact-finder could conclude that the city contractually delegated to Broadspire the authority to handle every aspect of all civil claims against the city—that is, a reasonable fact-finder could conclude that Broadspire was an agent for purposes of MCL 600.1930.

In the August 7, 2008, letter, Flory Morisette wrote to McLean's lawyer on Broadspire letterhead; she stated: "We are in receipt of your letter dated July 16, 2008 regarding the above claimant, Patricia McLean. We are the [third-party administrator] for the city of Dearborn under the self insured liability program." Morisette requested McLean's personal information and information about the accident and her medical treatment, including copies of her medical records and bills. Morisette closed the letter by requesting a meeting:

> We would like to meet at your office to talk with both you and your client. We will discuss her loss facts and injuries. Please contact your client to obtain several dates and times of availability and contact me immediately to schedule a meeting. We are looking forward to meeting you and your client in the very near future.

Morisette's statements strongly suggest that the city granted Broadspire the authority to handle McLean's civil claim. Although McLean sent her first letter to the city's mayor, Morisette stated that "we" (referring to Broadspire and its staff) are in "receipt" of that letter. A reasonable fact-finder could infer that Morisette was actually representing to McLean's lawyer that she and her company were the lawfully appointed representatives for the city; the fact-finder could also infer that Broadspire would not have had McLean's information or be "in receipt" of her first letter unless the city had *in fact* authorized Broadspire to act on the city's behalf. A reasonable fact-finder could conclude that the administrator of a self-insured fund would have broad authority to handle claims, which may include the authority to receive future service of process. And this inference was further bolstered by Morisette's assertion that she—not an official from the city's office—wanted to meet with McLean and her lawyer to discuss McLean's injuries and the facts of her case. This last statement, again, permits an inference that the city had authorized Broadspire to act on its behalf. Finally, a reasonable fact-finder could infer that the city granted this authority to Broadspire in a written agreement. Thus, Broadspire's letter is evidence, however limited, that the city actually authorized Broadspire to act as the city's agent for purposes of MCL 600.1930. Consequently, the trial court could properly consider this second letter in determining whether McLean complied with the notice requirements.

On the record evidence and arguments properly before this Court, the city failed to establish that it was entitled to summary disposition on the ground that McLean did not give it proper notice under MCL 691.1404. Consequently, I would affirm.

/s/ Michael J. Kelly